



THE FEDERAL ELECTION COMMISSION
Washington, DC 20463

VIA ELECTRONIC MAIL

And FIRST CLASS MAIL

APR 15 2010

Christopher DeLacy, Esq.
Holland & Knight
2099 Penn Ave., N.W.
Suite 100
Washington, D.C. 20006

RE: MUR 6054
1099 L.C. d/b/a Venice Nissan Dodge
Donald M. Caldwell

Dear Mr. DeLacy:

Based on a complaint filed with the Federal Election Commission on August 19, 2008, and information supplied by your clients, the Commission, on June 23, 2009, found that there was reason to believe that 1099 L.C. d/b/a Venice Nissan Dodge knowingly and willfully violated 2 U.S.C. §§ 441f and 441a(a), found that there was reason to believe that Donald M. Caldwell knowingly and willfully violated 2 U.S.C. § 441f, and instituted an investigation of this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that knowing and willful violations have occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your clients' position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief that you may submit will be considered by the Commission before proceeding to a vote on whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, good cause must be demonstrated, and the execution of an

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appropriate tolling agreement will be required. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

Your clients may also request an oral hearing before the Commission. See "Procedural Rules for Probable Cause Hearings," 72 Fed. Reg. 64919 (Nov. 19, 2007). Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing. Any request for a hearing must be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent expects to address. The Commission will notify you within 30 days of your clients' request for a hearing as to whether or not the request has been granted. If your clients' request is granted they will be required to toll the statute of limitations. See 72 Fed. Reg. at 64920.

Should you have any questions, please contact Jack Gould or Michael Columbo, the attorneys assigned to this matter, at (202) 694-1650.

Sincerely,



Thomasenia P. Duncan
General Counsel

Enclosure
Brief

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
1099 L.C. d/b/a Venice Nissan Dodge) MUR 6054
Donald M. Caldwell)

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GENERAL COUNSEL'S BRIEF

5 **I. INTRODUCTION**

6 On August 19, 2008, the Federal Election Commission ("the Commission") received a
7 complaint filed by Citizens for Responsibility and Ethics in Washington ("CREW"), Carlo Bell,
8 and David J. Padilla. The complaint alleged, among other things, that employees of 1099 L.C.
9 d/b/a Venice Nissan Dodge ("VND") were either reimbursed for, or coerced into, making \$1,000
10 contributions to Vern Buchanan for Congress ("VBFC"), the principal campaign committee of
11 Vernon G. Buchanan during his 2006 congressional campaign. The complaint specifically
12 alleges that Donald M. Caldwell, the General Sales Manager of VND in 2005, provided \$1,000
13 in cash to three VND managers, including Bell, in exchange for those managers writing \$1,000
14 checks to VBFC. The complaint further alleges that by these actions VND and Caldwell violated
15 the Federal Election Campaign Act of 1971, as amended ("the Act"), by making contributions in
16 the name of another to VBFC.

17 On June 23, 2009, the Commission found reason to believe that VND and Caldwell
18 knowingly and willfully violated 2 U.S.C. § 441f by using VND funds to make contributions to
19 VBFC in the name of another and that VND knowingly and willfully violated 2 U.S.C. § 441a(a)
20 by making an excessive contribution to VBFC. See VND and Caldwell Factual and Legal
21 Analyses in MUR 6054. During its investigation, the Commission obtained evidence, including
22 documents and testimony from VND, Caldwell, and other employees of VND, that shows that

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VND, with both the consent and active participation of Caldwell, used VND funds to reimburse contributions made to VBFC, and thereby knowingly and willfully violated 2 U.S.C. § 441f by making and assisting in the making of contributions in the name of another. Additionally, these contributions exceeded the \$2,100 per election limit for the 2006 election cycle, thereby resulting in an excessive contribution by VND to VBFC in violation of 2 U.S.C. § 441a(a).

Specifically, the evidence demonstrates that:

- Caldwell provided his five subordinate managers with \$1,000 cash in exchange for their making \$1,000 contributions to VBFC;
- One of the five managers, Carlo Bell, was not eligible for the kind of bonus Caldwell asserted the \$1,000 cash represented and in fact never received cash bonuses;
- Bell, as Finance Director, was compensated based on transactions such as the sale of warranties, insurance, and service plans, while the other four car sales managers were compensated based on the sale of cars and, therefore, Bell and the other managers never received bonuses on the same day and in the same amount;
- Although Caldwell asserted that he did not remember the purported bonuses himself, but rather relied on information provided by others to conclude his \$1,000 cash payments to his subordinate managers were bonuses, every source of information identified by Caldwell did not remember the bonuses and/or did not discuss them with Caldwell; and

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- VND's accounting and payroll records contradict Caldwell's assertion that the cash he requested and provided to his subordinate managers represented legitimate bonuses.

Accordingly, the Office of General Counsel intends to recommend that the Commission find probable cause to believe that VND and Caldwell knowingly and willfully violated 2 U.S.C. § 441f and that VND knowingly and willfully violated 2 U.S.C. § 441a(a).

II. BACKGROUND

A. Venice Nissan Dodge

VND is a car dealership located in Venice, Florida, that was organized as a partnership between Vernon G. Buchanan and Shelby Curtsinger in 1999. Shelby Curtsinger Deposition Transcript ("Curtsinger Depo") at 12. Buchanan was not involved in the day-to-day operation of VND and Curtsinger was the "owner operator on premises."¹ Curtsinger Depo at 18, 70-71. When Curtsinger became partners with Buchanan in 1999, he brought Donald Caldwell with him to VND from another car dealership where they both had been working. Caldwell Depo at 11-14. Caldwell was the General Sales Manager of VND in 2005, and he shares in the profits or losses of VND through Curtsinger's portion of the partnership.² Caldwell Depo at 13-14. In 2005, Buchanan began his campaign for the 2006 election to Congress in Florida's 13th Congressional District. See Buchanan FEC Statement of Candidacy dated July 1, 2005.³

¹ In 2005, Buchanan owned at least 51% of VND through 1099 LC Management, Curtsinger owned 39%, and Kevin Brodsky, another business partner of Buchanan, owned 10% of VND. Curtsinger Depo at 12-13, 17-18.

² No document memorializes Caldwell's share of VND's profits and losses; according to Caldwell, "It was done on a handshake." *Id.* at 14.

³ At that time, Buchanan was the majority owner of approximately fifteen to seventeen car dealerships, primarily located in Florida, as well as other businesses. House of Representatives Financial Disclosure Reports for Vernon Buchanan (May 11, 2006).

B. The Reimbursement of Contributions

Complainant Carlo Bell worked at VND from 2001 to 2007. Complaint at Exhibit A (hereinafter "Bell Affidavit"). In September 2005, he was the VND Finance Director and worked under Caldwell's direct supervision. *Id.* According to Bell, on Thursday, September 15, 2005, Caldwell called him into a meeting in the office of Jack Prater, VND Dodge Sales Manager. *Id.* In addition to Caldwell, Bell, and Prater, Jason Martin, VND Finance Manager and Caldwell's nephew, attended the meeting. *Id.* During this meeting, Caldwell told Bell, Prater, and Martin that they needed to contribute to VBFC. *Id.* Holding cash in his hand, he further explained that he would give them \$1,000 cash in exchange for their writing \$1,000 checks to VBFC. *Id.*

According to Bell, who had never contributed to a political campaign before (or since), he reacted by telling Caldwell that his proposal did not seem right and asking if it was legal. *Id.* Caldwell responded by asking Bell if he was on "the team" or not. *Id.* Bell and Caldwell then stared at one another quietly until Bell replied that he was part of "the team" and agreed to write the contribution check, although he did not do so at that time. *Id.* Caldwell then handed Bell, Prater, and Martin each \$1,000 in cash. *Id.* Prater and Martin accepted the cash without speaking. *Id.*

Bell, Prater, and Martin discussed the matter after leaving the meeting. *Id.* They all agreed that taking the \$1,000 in exchange for writing contribution checks to VBFC seemed wrong, but they feared that refusing to do so could endanger their jobs at VND. *Id.*

Bell averred that the day after Caldwell gave him the cash and solicited his contribution, he deposited \$960 of the cash into his bank account, and he wrote a \$1,000 contribution check to VBFC, and gave the contribution check to Caldwell. *Id.* Bell's bank records indicate that he

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1 made a cash deposit of \$960 on Saturday, September 17, 2005, and his contribution check to
2 VBFC is also dated September 17, 2005. See Complaint at Exhibit B.⁴

3 Jack Prater and Jason Martin, as well as VND managers Marvin White and William F.
4 Mullins, also contributed to VBFC; their contributions were made through personal checks that
5 were all dated Friday, September 16, 2005, and they were all checks for exactly \$1,000. VBFC's
6 disclosure reports filed with the Commission disclose the receipt of the five VND managers'
7 \$1,000 contributions on September 28, 2005.

8 The evidence indicates that contribution checks from Bell, Prater, Martin, White,
9 Mullins, Caldwell, Timothy Darrin Caldwell, and Silvia Caldwell were provided to VBFC
10 together in a VND business envelope that does not appear to have been mailed.⁵ The name
11 "Shelby" is written on the envelope and crossed out, which almost certainly refers to Shelby
12 Curtsinger, Caldwell's boss, and the Buchanan business partner who owned the minority share of
13 VND and who was responsible for its daily operation.

14 During his deposition, Caldwell admitted that he provided \$1,000 to his five subordinate
15 managers at approximately the same time that Bell alleges, and he admits that at about the same
16

⁴ Accordingly, the meeting in which Caldwell provided the managers with cash may have occurred on Friday, September 16, rather than Thursday, September 15, 2005. Furthermore, the VND check that Caldwell testified was cashed to provide each of the managers with \$1,000 cash was issued by VND on September 16, 2005. Caldwell also testified that he would have distributed the cash to the managers on Friday, September 16, because that was their payday. Caldwell Depo at 54.

⁵ VBFC disclosed that Donald M. Caldwell, Timothy D. Caldwell, and Silvia Caldwell each contributed \$4,200 on September 28, 2005. Timothy Darrin Caldwell is Donald Caldwell's brother and the Service Director at VND. Caldwell (Donald) Depo at 102-03. Silvia Caldwell lives at the same address as Timothy Caldwell, according to VBFC's disclosure report.

1 time, he discussed their contributions to VBFC.⁶ Caldwell Depo at 71 (he gave the \$1,000 cash
2 to the managers and asked them to contribute to VBFC in one meeting); *id.* at 54 (he would have
3 distributed the \$1,000 cash to each manager on Friday, September 16, 2005). Nevertheless,
4 Caldwell asserts that the cash payments were not reimbursements for the managers'
5 contributions. Caldwell Depo at 65-67. The four managers other than Bell who received \$1,000
6 cash from Caldwell and that same day made \$1,000 contributions to VBFC also denied that their
7 contributions were reimbursed. See VND Response dated October 17, 2008 at Exhibits A-D
8 (Affidavits of Prater, Martin, Prater, White, and Mullins). Caldwell testified that the \$1,000 cash
9 payments were "Fast Start" bonuses and that he remembered what he said at the moment when
10 he gave the bonus cash to his subordinate managers, that is, he told them that he was contributing
11 to VBFC, noted that "You guys have this bonus," and discussed the managers also making a
12 contribution to VBFC. Caldwell Depo at 71; *see also id.* at 73 ("I said that I was contributing to
13 Vern's campaign. You know. 'You guys' - 'We're making good money this year. You guys
14 are making big money. If you want to contribute that would be great, to get behind
15 [Buchanan]."); *id.* at 100 (Caldwell informed Prater, who Caldwell testified was not at the
16 meeting, that he (Caldwell) had told the other managers that "Here, I got your bonuses coming
17 out . . . I was going to contribute, if they wanted to contribute."); *see also id.* at 39-40 and VND

⁶ Caldwell testified that he would have provided \$1,000 cash to each of the five managers on Friday, September 16, 2005. Caldwell Depo at 54. This statement corroborates Bell's Affidavit in which Bell averred that \$960 of the \$1,000 cash that Caldwell gave him was deposited in his personal bank account the following day, which, according to his bank records, was September 17, 2005. That Caldwell requested \$5,000 in cash from the VND accounting office and provided \$1,000 to each of his five subordinate managers on September 16, 2005, is significant because the five conduits' \$1,000 contribution checks are dated September 16, 2005 (Martin, Prater, Mullins, and White) or September 17, 2005 (Bell), that is, they received the cash and virtually immediately made their contributions.

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General Counsel's Brief
1099 L.C. d/b/a Venice Nissan Dodge
Donald M. Caldwell

1 Submission dated September 21, 2009 at DC 094 (Caldwell identified the \$5,000 check as the
2 source of five \$1,000 "Fast Start" bonuses paid to Bell, Prater, Martin, Mullins, and White).⁷

3 As discussed below, the weight of the evidence does not support Caldwell's claims. In
4 addition to Bell's sworn statement that the cash payments were not bonuses, the testimony of all
5 the witnesses and the documentary evidence indicates that Caldwell's five subordinate managers
6 all received \$1,000 cash payments on the same day and then all virtually immediately made
7 \$1,000 contributions to VBFC. Moreover, Bell had a clear recollection of the meeting and
8 Caldwell's payment as a reimbursement rather than a bonus, while the other contributors and

⁷ Nevertheless, at other points in his testimony, Caldwell did not appear to remember paying the bonuses in general, nor did he appear to have a specific memory of paying bonuses during a meeting in which he discussed making contributions to VBFC. See *Caldwell Depo* at 42 ("I'm going to assume that someone took [the \$5,000 VND check] to the bank and cashed it and then would have given me \$5,000 in cash and then I would have disbursed the money."); *id.* at 44 ("I only recall this [Fast Start bonus] based [*sic*] because of all the information per your request, the other people who were named, so I had to gather the information, was the reason I was able to piece this back together, to the best of my knowledge."). When directly asked whether he remembered handing out these bonuses, Caldwell testified:

A. I would have handed the bonus out myself to those gentlemen. Yes.

Q. Do you have a recollection of doing so?

A. Do I have a recollection of where or when or time? No. But if I requested the money and I paid them the bonus, I would have paid it out. Yes.

Q. Where would you have paid it out? In your office?

A. Wherever they were sitting, standing. You know, they could have been outside, inside. I don't know . . .

Q. Going back to the September 2005 Fast Start Bonus, do you have any recollection as to where you and the individuals who were getting this bonus -- where that was when you were handing out those bonuses?

A. No. I would have received the money -- I'm assuming the 16th was a Friday. I'm assuming that was their payday. I might have found them wherever they were sitting and paid them their bonus when I paid them their paycheck.

Id. at 53-54; see also *id.* at 51 (Caldwell determined that the \$5,000 VND check was for Fast Start bonuses after he talked to "everybody to piece it back together . . . It had to be stacked together by many people."). Caldwell then specified that he spoke to Prater, Martin, Christina Kimb, the VND Office Manager, and "probably" spoke to White. *Id.*

1 Caldwell do not recall the bonuses except as something they assume took place. Caldwell's
2 explanation that his \$1,000 cash payments to each of the five subordinate managers were
3 legitimate "Fast Start" bonuses is contradicted by the facts that Bell, a VND Finance Director,
4 was not eligible for "Fast Start" bonuses, which are bonuses for selling cars early in a given
5 month, and there is no contemporaneous documentation in VND's accounting and payroll
6 records indicating that Caldwell's five \$1,000 payments to the contributors were bonuses.

7 **IV. LEGAL ANALYSIS**

8
9 The investigation reveals that Respondents VND and Donald M. Caldwell knowingly and
10 willfully made contributions in the name of another in violation of 2 U.S.C. § 441f by using
11 VND funds to make campaign contributions in the names of others. Specifically, Caldwell paid
12 five VND managers \$1,000 each so that they could make \$1,000 campaign contributions to
13 VBFC. These reimbursed contributions also constitute an excessive contribution by VND to
14 VBFC in knowing and willful violation of 2 U.S.C. § 441a(a) because the \$5,000 total exceeded
15 the maximum allowable contributions from VND, a partnership, to VBFC in the 2006 election
16 cycle.

17 **A. VND and Caldwell Knowingly and Willfully Made Contributions in the**
18 **Name of Another in Violation of 2 U.S.C. § 441f**

19
20 The Act defines "contribution" as anything of value made by any person for the purpose
21 of influencing any election for federal office. 2 U.S.C. § 431(8)(A)(i). Under the Act, no person
22 shall make a contribution in the name of another person or knowingly permit his or her name to
23 be used to effect such a contribution. 2 U.S.C. § 441f; 11 C.F.R. § 110.4(b)(1)(i). This
24 prohibition further provides that no person shall knowingly help or assist any person in making a
25 contribution in the name of another. 11 C.F.R. § 110.4(b)(1)(iii). Contributions in the name of

1 another include giving money, all or part of which is provided to the contributor by another
2 person (the true contributor) without disclosing the source of money to the recipient candidate or
3 committee at the time the contribution is made. 11 C.F.R. § 110.4(b)(2)(i).

4 There is no dispute that Caldwell met with several of his managers, including Bell, in the
5 second week of September 2005, gave them \$1,000 cash from VND, and discussed their use of
6 that cash to make contributions to VBFC. See Bell Affidavit ("Mr. Caldwell shut the door to the
7 office and told the three of us that we needed to contribute to the campaign of Vern Buchanan,
8 who was then running for Congress in Florida's 13th Congressional District. Mr. Caldwell was
9 holding cash in his hand at the time and . . . explained that the company would give us \$1,000
10 cash in exchange for our writing \$1,000 checks to the campaign."); Caldwell Depo at 71 ("I'm
11 contributing. You guys have this bonus. It would be nice' - 'Vern is running for Congress. If
12 you guys want to contribute to that, it would be great.'"). There is also no dispute that
13 Caldwell's subordinate managers each received \$1,000 on or about September 16, 2005, and that
14 each wrote \$1,000 contributions checks to VBFC on September 16 or 17, 2005. There is also no
15 dispute that the funds that Caldwell provided to his five subordinates were VND funds.

16 Carlo Bell submitted a sworn statement alleging that he and other VND managers were
17 called into a meeting with VND general sales manager Donald Caldwell, who told them that they
18 needed to contribute to VBFC and that VND would reimburse their contributions. More
19 specifically, Caldwell told the managers that VND would give them \$1,000 in exchange for their
20 writing \$1,000 checks to the campaign. Bell Affidavit. After Bell questioned whether this was
21 legal, Caldwell asked him if he was on "the team" or not and stared at him until Bell, afraid that
22 he would lose his job if he refused, stated that he was part of "the team" and agreed to write the
23 check. *Id.*

1 The weight of the evidence in this matter corroborates Bell's account of the
2 reimbursements and refutes Caldwell's claim that the cash payments were bonuses.

3 **1. Finance Directors, Like Bell, Are Not Paid Fast Start Bonuses, and Bell**
4 **Never Received Cash Bonuses**

5
6 Caldwell's claim that the \$1,000 cash he gave to each of his five subordinate managers
7 was for Fast Start bonuses, Caldwell Depo at 71, is contradicted by the fact that Bell, as Finance
8 Director, did not receive Fast Start Bonuses. Fast Start bonuses were bonuses paid to
9 salespersons and sales managers to reward selling cars early in a month. Christina Hiras (VND
10 Office Manager) Depo at 24; *see also* Caldwell Depo at 44 (a Fast Start bonus is to get the month
11 off to a Fast Start); Mullins Depo at 16 ("If you hit a certain number of cars fast, they give you a
12 bonus."); Prater Depo at 34 (a Fast Start bonus "is to hit a number early in a month to get a Fast
13 Start on that month"); Martin Depo at 33 (Fast Start bonuses were for selling a certain number of
14 cars or making a certain amount of money early in the month). Bell, who was not a car salesman
15 or the manager of car salesmen, was not eligible to receive Fast Start bonuses. Bell, as Finance
16 Director, was compensated through commissions on the sale of warranties, insurance, service
17 plans, and through finance reserves. Bell Supplemental Affidavit dated March 26, 2010. Sales
18 managers are compensated based on different criteria, that is, commissions on the profits sold
19 from cars. *Id.* In an interview, Brad Combs, who worked for Bell in VND's Finance
20 Department, corroborated Bell's statement that Finance Department managers do not receive
21 Fast Start bonuses because their compensation is not based upon the number of cars sold.
22 Accordingly, at no time during Bell's employment at VND did all of the managers receive a
23 bonus on the same day and in the same amount. Bell Supplemental Affidavit. Moreover, Bell
24 never received cash bonuses. *Id.*

2. Caldwell's Testimony Regarding the Alleged Bonuses Is Unconvincing

Caldwell's assertion that the \$1,000 that he gave to each of his five subordinate managers was for Fast Start bonuses is unpersuasive because he could not remember the circumstances of the September 2005 Fast Start bonuses that he awarded; he testified that he threw away the only record that VND had regarding the criteria for the bonuses, the amount of the bonuses, and the recipients of the bonuses; and because everybody who Caldwell cited as the sources of information that he pieced together to conclude that the \$1,000 cash payments were Fast Start bonuses did not remember the bonuses and/or did not discuss what they remembered with Caldwell.

In response to a Commission subpoena, VND provided a copy of the \$5,000 VND check that was used to obtain \$5,000 in cash to pay the VND employees who contributed a total of \$5,000 to VBFC. See VND Submission dated September 21, 2009 at DC 094. The page of the submission containing the image of the \$5,000 check also included handwriting beneath the check stating "September Fast Start Bonus." below which was listed the names of Bell, Martin, Prater, Mullins, and White; and next to each name was written "\$1000." See *id.* There was no indication or explanation in the production letter or on this page of the production that the original document being produced had been altered. As received, the document appeared to be an original VND record demonstrating that the \$5,000 check had been cashed to pay for five \$1,000 cash bonuses to Bell, Martin, Prater, Mullins, and White. However, Caldwell testified during his deposition that the handwriting at the bottom of the page was his and that he did not add that information to the copy of the check until it was about to be produced to the Commission in response to the Commission's subpoena in 2009. Caldwell Depo at 39-40.

1 Although Caldwell's writing about the cash payments on the bottom of the check copy
2 produced to the Commission indicated certainty about the use of the cash, Caldwell subsequently
3 testified that he did not remember the basis for the September 2005 Fast Start Bonuses, and he
4 had no documents explaining them. *Id.* at 46, 48. Caldwell's only record of the basis and
5 amount of these purported bonuses was Caldwell's desk blotter calendar, which he testified he
6 threw out at the end of each month. *Id.* at 49, 52. When Caldwell was questioned about his clear
7 assertion that the \$5,000 check was for five \$1,000 Fast Start bonuses despite having no memory
8 of Fast Start bonuses in 2005 and having discarded the only records of the bonuses, Caldwell
9 testified:

10 I only recall this one only based [*sic*] because of all the information per your
11 request, the other people who were named, so I had to gather the information,
12 was the reason I was able to piece this back together, to the best of my
13 knowledge.
14

15 Caldwell Depo at 43-44, 90-91. Caldwell's testimony that the \$5,000 that he gave to Bell,
16 Prater, Martin, Mullins and White was for a Fast Start Bonus was based on Caldwell having to
17 "talk to everybody to piece it back together." Caldwell Depo at 91. "It had to be stacked
18 together by many people." *Id.*

19 Caldwell identified the people he possibly could have consulted to conclude that the
20 \$5,000 in payments were for Fast Start Bonuses: Christina Hires, Marvin White, Jack Prater,
21 and Jason Martin. *Id.* Caldwell testified that he asked them:

22 Do you recall any of this? I've got to get this information. Do you have any of
23 this information available for me?
24

25 *Id.* However, as described in further detail below, the accounting record for the \$5,000 check,
26 unlike the records for every other similar bonus from 2003 to 2007, does not indicate that it is for
27 a bonus. Furthermore, Prater, Hires, and Mullins testified that they either did not remember

1 anything about the September 2005 Fast Start bonus and/or never discussed it with Caldwell.
2 See Prater Depo at 45-47 (neither Caldwell nor Curtsinger ever asked him about his contribution
3 to VBFC, he never helped Caldwell look for documents or clarify the facts regarding his
4 contribution, and Caldwell never asked for Prater's help in remembering the events that led to his
5 making the contribution); Hires Depo at 8 (she had no discussions with Caldwell about this
6 matter); *id.* at 39-40, 58 (she has no memory of this particular check or purported bonus
7 recipients); *id.* at 44-59, 62-64 (she was unable to identify the purported bonuses in the payroll
8 records of the bonus recipients); Mullins Depo at 32-34 and 40 (after he made his contribution,
9 he never spoke with Caldwell or anyone else about what he remembered of his contribution to
10 VBFC); White Depo at 35-36 (he was not aware of anyone asking him questions about his
11 contribution after he made it and that he did not remember talking to any of the other VND
12 managers about it). Martin, Caldwell's nephew, also conceded that he did not remember the
13 meeting in which Caldwell discussed their making contributions to VBFC, was "guessing in
14 general" about what occurred, and he suggested that he too was basing his testimony on what
15 others told him, including Caldwell and the other managers (who testified that they did not
16 remember and/or did not discuss what they remembered):

17 Q. Has anyone . . . else who was at that meeting or not at that meeting shared
18 with you what they remember Mr. Caldwell saying?
19

20 A. Actually, I can recall that I think maybe our discussion - - my discussion
21 with Mr. Caldwell, he might have said something along the lines of what he
22 remembered. And then you take little pieces of what Jack [Prater] said he
23 remembered and what Marvin [White] said he remembered - or Jack, I don't
24 think Jack was there, from what he said.
25

26 Martin Depo at 71-72.

1 The managers' inability to remember the purported bonuses and their testimony that they
2 did not discuss the bonuses with others contradicts testimony provided by Curtsinger. Curtsinger
3 testified that when the allegations arose, he called each manager individually into his office to
4 discuss their contributions before calling the VND attorney. Curtsinger Depo at 63. The
5 inability of Prater, Martin, White, and Mullins to remember the bonuses also calls into question
6 the probative value of their identical affidavits denying the reimbursement of their contributions.
7 See Response to Complaint dated August 22, 2008.

8 In sum, Caldwell's testimony asserting that the \$5,000 that he provided to his five
9 subordinate managers was for Fast Start bonuses is undermined by his lack of independent
10 recollection of the circumstances of the \$5,000 cash that he provided to the managers who used
11 those funds for contributions to VBFC, his disposal of his (and VND's) only record of the
12 purported bonus, the accounting and payroll records' failure to support the \$5,000 as bonuses
13 (see next section), and the individuals involved not remembering or not discussing the
14 circumstances of the bonus with Caldwell, which Caldwell claimed was the basis of his
15 testimony about the alleged bonus. By contrast, Carlo Bell's sworn statement is clear as to what
16 transpired with respect to the meeting with Caldwell and the reimbursement of his \$1,000
17 contribution to VBFC. See Carlo Bell Affidavit.

18 **3. VND Records Do Not Support the Claim that the \$5,000 Cash Payments**
19 **Represented Legitimate Bonuses**
20

21 VND's accounting records contradict Caldwell's claim that the cash he provided to his
22 subordinates represented bonuses. According to Caldwell, when he wanted to pay a cash bonus,
23 the process would involve (1) notifying the accounting/payroll staff that he needed to pay a
24 bonus and that the staff needed to issue a check for the dollar amount, cash it at the bank, and

bring him the cash; (2) telling accounting/payroll staff who the bonus recipients were; and (3)

Caldwell distributing the cash bonuses to the recipients. Caldwell Depo at 34.

Christina Hires, the VND office manager since April 2000, is in charge of the VND accounting and payroll office and reports to Curtsinger. Hires Depo at 10-11. Hires testified during her deposition that any disbursement that does not have an invoice or statement to go with it requires a check request signed by a manager (Curtsinger, Caldwell, finance managers, and Timothy Darrin Caldwell).⁸ *Id.* at 15, 17. Hires searched the VND files but did not find any record of a check request for the \$5,000. Hires Depo at 20. According to Hires, "Sometimes I get a phone call that says, 'I need this much money because of this bonus.'" Hires Depo at 20. Verbal check requests are memorialized by writing, for example, "per Don" in the description field of the check. *Id.* at 21.

Caldwell testified that he would have been the person to request the \$5,000 check at issue and that his request would have been verbal. Caldwell Depo at 56-57. However, the \$5,000 check made out to cash that was used by Caldwell did not contain "per Don" in its description field, as Hires indicated would normally be the case if Caldwell made a verbal check request. Hires Depo at 21; VND October 15, 2009 Submission at Exhibit A at DC 406.⁹

VND also produced copies of all similar checks issued from 2003 to 2007 to pay cash bonuses like the one that Caldwell purportedly paid to the five VND managers. VND

⁸ Hires testified that Curtsinger did not review all check requests, but either she or Curtsinger was required to be one of the two signatories on every check. Hires Depo at 13. If Curtsinger was not one of the two signatories of a check, Hires provided him with a copy of it so that he could have an opportunity to approve or disapprove it. Hires Depo at 23. The \$5,000 VND check at issue in this matter was signed by Hires and Timothy Darrin Caldwell. Hires Depo at 19.

⁹ Rather, the check included a remark "PER TM." VND October 15, 2009 Submission at Exhibit A at DC 406. Hires testified that "PER TM" referred to her. "Probably because I was called and asked to get the check[.]" Hires Depo at 74. Hires testified that she had no memory of this particular check or transaction, and she did not remember or have direct knowledge of who received the bonuses. Hires Depo at 39-40, 58.

1 October 15, 2009 Submission at Exhibit A. Every one of the other similar bonus checks issued
2 from 2003 to 2007, all payable to cash, was accompanied by a printout of an accounting
3 computer record that indicated that the checks were used for a bonus. *Id.* The September 16,
4 2005, \$5,000 check payable to cash that was used by Caldwell, however, did not. *See id.* at DC
5 405 to DC 406. The accounting record for the \$5,000 check that was used to pay \$1,000 each to
6 Bell, Martin, Mullins, Prater, and White did not indicate that it was for a bonus; rather, it only
7 indicated the denominations of the bills requested when the check was cashed (fifties, twenties,
8 and tens). *See id.* at DC 406; Hires Depo at 73.

9 Further, the VND payroll records do not reflect that the recipients of the \$5,000 cash
10 received \$1,000 bonuses as would be expected if the cash payments were for legitimate bonuses.
11 Legitimate cash bonuses paid to a VND employee should be added to the recipient's payroll so
12 that taxes can be withheld and then the amount of the cash bonus deducted from their paycheck
13 by recording them as an employee receivable, which is the process described by Hires in her
14 deposition. Hires Depo at 28, 51-52. Curtsinger confirmed this process: "If it's a cash-in-fist
15 bonus, [Caldwell will] state it as a cash-in-fist, meaning that [the recipients] get the cash
16 knowing that they're going to have to have it added to their taxable amount and that they will
17 pay taxes on it at month end." Curtsinger Depo at 59. For example, regarding a \$1,000 cash
18 bonus paid to Jack Prater in May 2005, before the activity in this matter, *see* VND Submission
19 dated March 8, 2010 at JP 043, the VND payroll records indicated that Prater was taxed on the
20 \$1,000 bonus and also that the total amount of his paycheck was reduced by \$1,000, indicating
21 that Prater had already received the funds for the bonus before the paycheck was issued.
22 Curtsinger Depo at 40-41. The deduction from his pay to account from the cash bonus was

1 accomplished through an entry in the payroll records in a field called "EMP REC" [employee
2 receivables]:

3 There was a miscellaneous income of [\$]1,000, but there was also an employee
4 receivable of [\$]1,000. So he could have been given a bonus and what they did is
5 now they show it on the check. That could have been a bonus from whatever, if
6 Jack – if he could remember. And then they added it into his check so they could
7 tax it. And then they took it back out because they'd already given him the
8 money, because that receivable was \$1,000. It offset the \$1,000 sales bonus. So
9 it looks like he was given a bonus, they added it in, taxed it and then took it back
10 out on the bottom line under the receivable[.]

11
12 Curtsinger Depo at 40-41.

13 Curtsinger testified that the EMP REC field is used in the VND payroll records to record
14 cash bonuses. *Id.* at 78-79. Other than the payroll records, Curtsinger was unaware of any other
15 records at VND that would indicate which employees or managers received a bonus. Curtsinger
16 Depo at 92.

17 Tellingly, the payroll records of each of the five purported recipients of the purported
18 \$1,000 cash Fast Start bonuses do not include any indications that they received \$1,000 cash
19 bonuses in September 2005. See VND Submission dated September 21, 2009 at DVC352 (Carlo
20 Bell), VND Submission dated March 8, 2010 at JM 037 (Jason Martin), WM 030 (William
21 Mullins), JP047 (Jack Pinter), and MW 071 (Marvin White).

22 In conclusion, these facts support the conclusion that the \$5,000 was not used for
23 bonuses: (1) the VND accounting records do not indicate that it was Caldwell who requested the
24 \$5,000; (2) the records do not include a computer-generated accounting record that indicates
25 that, as is the normal procedure, the \$5,000 would be used for bonuses, as every other similar
26 check record does; and (3) the VND payroll records do not reflect cash bonuses being paid to the
27 five recipients of the purported bonuses. Indeed, the records' failure to note that it was Caldwell

1 who requested the \$5,000 and the lack of any description for what the funds were to be used --
2 unlike the records for other cash bonus fund requests -- indicates an attempt to disguise the
3 purpose of these funds and the manager who was using them.

4 **4. VND and Caldwell's Violation of 441f was Knowing and Willful**

5 Based on the extensive evidence developed in this investigation, there is probable cause
6 to believe that VND and Caldwell violated the Act by making contributions in the names of
7 others, and that their violation was knowing and willful. The phrase "knowing and willful"
8 indicates that "acts were committed with a knowledge of all the relevant facts and a recognition
9 that the action is prohibited by law...." H.R. Rpt. 94-917 at 3-4 (Mar. 17, 1976) (reprinted in
10 Legislative History of Federal Election Campaign Act Amendments of 1976 at 803-04 (Aug.
11 1977)); see also *National Right to Work Comm. v. FEC*, 716 F.2d 1401, 1403 (D.C. Cir. 1983)
12 (citing *AFL-CIO v. FEC*, 628 F.2d 97, 98, 101 (D.C. Cir. 1980) for the proposition that
13 "knowing and willful" means "'defiance' or 'knowing, conscious, and deliberate flaunting' [sic]
14 of the Act"); *United States v. Hopkins*, 916 F.2d 207, 214-15 (5th Cir. 1990). The *Hopkins* court
15 also held that taking steps to disguise the source of funds used in illegal activities might
16 reasonably be explained as a "motivation to evade lawful obligations." *Hopkins*, 916 F.2d at
17 213-14 (citing *Ingram v. United States*, 360 U.S. 672, 679 (1959)) (internal quotations
18

1 omitted).¹⁰ The conclusion that VND and Caldwell's violation was knowing and willful is
2 supported by: Caldwell's disregard for Bell's questioning the legality of the reimbursement;
3 respondents' failure to keep any records of the purported bonus criteria, amounts, and recipients;
4 their failure to include the purported bonuses in the payroll records of the purported recipients of
5 the bonuses; and the lack of evidence supporting the respondents' assertion that the cash paid to
6 Messrs. Bell, Martin, Prater, Mullins, and White was a legitimate bonus.

7 **B. VND Knowingly and Willfully Made Excessive Contributions in**
8 **Violation of 2 U.S.C. § 441a(a).**
9

10 In the 2006 election cycle, the individual contribution limit for giving to candidate
11 committees was \$2,100 per election. The contributions of a partnership are attributed to
12 both the partners and the partnership itself, that is, the partnership itself is subject to the
13 contribution limit in effect at the time for individuals. See 11 C.F.R. § 110.1(e).
14 Accordingly, a partnership that reimbursed contributions totaling more than \$2,100 per
15 election in the 2006 cycle would also have made an excessive contribution in violation of
16 2 U.S.C. § 441a(a).

17 Because VND, acting through Caldwell, the General Sales Manager, reimbursed \$5,000
18 of contributions by Caldwell's subordinates to VBFC on September 16, 2005, it exceeded the

¹⁰ On June 8, 2009, a federal district court judge in California dismissed criminal charges that Francis O'Donnell violated section 441f by reimbursing conduit contributions to the 2004 presidential campaign of Senator John Edwards, ruling in part that Congress did not intend that provision to outlaw indirect contributions made through conduits. *U.S. v. O'Donnell*, C.D. Cal., Criminal No. 08-872. However, the *O'Donnell* court's order is unlikely to be upheld on appeal because (1) it mistakenly assumes Section 441f prohibits all conduit contributions, including those reported under Section 441a(a)(3); (2) its analysis interprets section 441f in a manner that permits the type of deceptive conduct that the statute was designed to prohibit; and (3) the district court's decision appears to rely on certain limited and ambiguous portions of FECA's legislative history, some of which may not have pertained to section 441f, but ignored or disregarded other portions of the legislative history that clearly supported the Commission's interpretation of the statute. See MUR 5818 (Fieger) General Counsel's Report #2 at 15; Memorandum re: Recommendation to Participate as Amicus Curiae in *United States v. O'Donnell*, No. 09-50296 (9th Cir.), dated July 21, 2009. On September 23, 2009, the Commission filed an amicus curiae brief urging the Ninth Circuit to reverse the *O'Donnell* decision. See MUR 5504 (Karo) and MUR 5818 (Fieger) (recent Commission matters involving Section 441f violations).

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1 \$2,100 per election limit on contributions in the 2006 election cycle. Based on the circumstances
2 described above, including VND's accounting records for the \$5,000 check not indicating its
3 purpose, the unsupported claim that the \$5,000 was used for Fast Start Bonuses, even to a
4 manager who is not eligible for Fast Start Bonuses, and the VND payroll records also not
5 reflecting that the managers in question received \$1,000 cash bonuses, VND appears to have
6 deliberately disguised its excessive contribution because it was aware that the Act prohibited a
7 contribution in that amount. Evidence that VND was aware of the contribution limit includes
8 Cutziager, Caldwell, Silvia Caldwell, and Darrin Caldwell all contributing precisely \$4,200 to
9 VBFC in the 2006 election cycle, the maximum allowable combined contributions for a
10 candidate's primary and general elections in that cycle. Accordingly, VND's violation of
11 2 U.S.C. § 441a(a) was knowing and willful.

12 This Office is therefore prepared to recommend that the Commission find probable cause
13 to believe that 1099 L.C. d/b/a Venice Nissan Dodge and Donald M. Caldwell knowingly and
14 willfully violated 2 U.S.C. § 441f. Because VND is taxed as a partnership, it appears that VND
15 violated 2 U.S.C. § 441a(a) by contributing more than \$2,100 per election in 2005 to VBFC.
16 Accordingly, the General Counsel recommends that the Commission find probable cause to
17 believe that 1099 L.C. d/b/a Venice Nissan Dodge knowingly and willfully violated 2 U.S.C.
18 § 441a(a).

19 **V. GENERAL COUNSEL'S RECOMMENDATIONS**

- 20
21 1. Find probable cause to believe that 1099 L.C. d/b/a Venice Nissan Dodge
22 knowingly and willfully violated 2 U.S.C. § 441f.
23
24 2. Find probable cause to believe that 1099 L.C. d/b/a Venice Nissan Dodge
25 knowingly and willfully violated 2 U.S.C. § 441a(a).
26

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3. Find probable cause to believe that Donald M. Caldwell knowingly and willfully violated 2 U.S.C. § 441f.

April 14, 2010
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